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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SP INVESTMENT FUND III, LLC, Plaintiff and Appellant, v. WILLIAM A. ZELL et al., Defendants and Respondents.	B278003 (Los Angeles County Super. Ct. No. BC578354)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Greenberg Glusker Fields Claman & Machtinger and Garrett L. Hanken for Plaintiff and Appellant.

Loeb & Loeb and Daniel J. Friedman for Defendants and Respondents.

In 2011, respondent William Zell (Zell), a New York resident, received an unsolicited offer from appellant SP Investment Fund III, LLC (SP) to buy Zell's single-unit share of a New York limited partnership for $3,600. Zell accepted the offer and signed a one-page purchase agreement, which stated that he agreed to sell, and SP agreed to buy, "all of Seller's Rights and Claims relating to" the partnership. A year and a half later, SP advised Zell that the partnership had not approved the transfer of Zell's unit, and thus Zell would remain its record owner. SP asserted, however, that the purchase agreement nonetheless remained in force, and Zell would be obligated to transfer to SP all income and distributions he received from the partnership and to vote his partnership interest as SP directed. SP resisted Zell's subsequent attempts to cancel the sale and return the purchase price with interest, instead suing Zell for specific performance, compensatory damages in excess of $290,000, and punitive damages, among other things.

The trial court concluded that the purchase agreement was unenforceable as a matter of law and granted summary judgment for Zell. We affirm. As we discuss, the agreement governing the partnership provides that limited partners may not transfer their interests without the general partner's consent, and it is undisputed that the general partner withheld consent in this case. Enforcing the purchase agreement would permit SP to avoid the transfer restrictions and do indirectly what it could not do directly—to exercise the rights of a partner to participate in partnership decisions and receive partnership distributions. It would, moreover, thwart the partnership's ability, protected by statute, to choose with whom it does business. Accordingly, we

conclude that the purchase agreement is unenforceable, and we thus affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. SP Investment's Offer to Purchase Zell's Limited Partnership Interest in Newport Highlands

Zell, now deceased, was a resident of Rochester, New York. He held one unit, or a 1.8333 percent interest, in Newport Highlands Associates (Newport Highlands), a New York limited partnership.

In April 2011, when Zell was 85 years old, he received an unsolicited letter from SP, a California limited liability company, offering to buy his interest in Newport Highlands. The letter suggested Zell might want to sell for a variety of reasons, including that "you may find that your interest is now generating substantial 'phantom income' (i.e. taxable income in excess of any cash distributions) and that the phantom income burden will worsen. For a number of years, you may have been knowingly or unknowingly reaching into your own pocket to pay taxes on phantom income. At the same time, you may also find that the tax recapture has reached a point where a sale is feasible, and you may even find that you will be able to claim a tax loss upon sale of your interest."

Shortly thereafter, Zell received another unsolicited letter from SP, dated April 12, 2011, offering to buy his interest in Newport Highlands for $3,600. In pertinent part, the letter stated: "From what we understand from the 2010 K1 we have received, your limited partnership interest generated taxable income to you for the 2010 tax year of $4,900, but you received a net distribution check of approximately $364 in 2010. Unless you could shelter the taxable income, you may have come out of

pocket for a significant amount of money to pay taxes on your 2010 phantom income. From what we understand, this tax liability will get worse over time due to decreasing depreciation and interest deductions, and, absent a sale of your interest or the project, **you will be allocated in excess of $94,000 in phantom taxable income in the next fifteen years."** The letter stated that if Zell were interested in selling his interest in Newport Highlands, he should "fill out and sign the attached Consent to Transfer . . . using the enclosed prepaid envelope." Upon receiving the consent, SP would **"prepare and Federal Express you a check for $3,600 along with purchase documents."** (Emphasis in original.)

On April 12, 2011, Zell signed and returned the consent to transfer "all rights I own/represent related to Newport Highlands Associates (the Interest) to SP Investment Fund, LLC (SP) or its designee for $3,600."

B. The General Partner's April 2011 Letter to SP Advising That It Would Not Consent to a Transfer of Limited Partnership Interests to SP

On April 14, 2011, Anne Dyring Riley, an attorney for Newport Highlands's operating general partner, faxed a letter to SP's manager, Gil Seton. The letter said:

"I have been notified by my client that several of the Limited Partners have received correspondence from SP Investment Fund LLC requesting to purchase their limited partnership interest.

"Please be aware that pursuant to the Limited Partnership Agreement, limited partners may not transfer their partnership interest without the consent of the Operating General Partner and any transferee who proposes to acquire an interest of a

limited partner is also subject to the Operating General Partner's Consent. The Operating General Partner will not consent to any transfers of limited partner interest or entry of any new limited partners. In any event your company's request should be to the Operating General Partner and not the Limited Partners.

"In your letter to the Limited Partners you request copies of recent K-1 and/or financial reports. The information requested contains personal information and social security numbers of the Limited Partners which should be kept confidential. [¶] . . . [¶] . . .

"Please be advised that without the consent of the Operating General Partner the Limited Partners are not able to transfer their respective interest to SP Investment Fund LLC."

C. SP's Purchase of Zell's Limited Partnership Interest

By letter dated May 6, 2011, SP sent Zell a form purchase agreement and share assignment, which Zell was instructed to sign and return, and a check for $3,600. Zell signed and returned the purchase agreement and assignment to SP.

The first page of the purchase agreement, which was the only page Zell signed, stated that "[Zell] agrees to sell to [SP] and [SP] agrees to purchase from [Zell] the Partnership Interest," defined as "All of Seller's Rights and Claims relating to . . . Newport Highlands Associates, a New York limited partnership," for "the Purchase Price pursuant to the Terms attached hereto, which are a part of this Agreement." It further stated the "purchase price" was $3,600, the "deposit" was $3,600, and the "effective date" was May 6, 2011.

This apparently straightforward agreement was made considerably more complex by the attached two pages of "Terms

and Conditions" (which Zell initialed, but did not sign), as follows:

The Terms and Conditions redefined the "Partnership Interest" as the "Seller's entire direct or indirect interest in the Partnership, including . . . Seller's Rights and Claims in, to, or with respect to the Partnership." "Seller's Rights" were defined as including:

(1) "Seller's Economic Rights," defined as "All Seller's rights in, to, or with respect to Economic Benefits"—i.e., to "[a]ll monetary amounts or property paid, distributed, or owed as capital, profit;" and

(2) "Seller's Partnership Rights," defined as "Seller's rights (other than Economic Rights) as an admitted partner in the Partnership, including but not limited to the right to vote as a partner in, the right to review books and records of, and the rights as a beneficiary of fiduciary duties owed by the Partnership and/or other partners in, the Partnership. . . ."

The Terms and Conditions further stated that the sale would not occur on the agreement's "Effective Date" of May 6, 2011. Instead, on "the Effective Date," Zell would assign his interest to SP "in trust," and SP would hold the assignment "in trust until the Closing Date." The "Closing Date" was *either* the date by which SP had obtained the "Necessary Approvals: any approvals, consents, or other actions of the Partnership . . . that are necessary for [SP] to receive, exercise, and/or enjoy the full benefit of any portion of the Partnership Interest" *or* "within five days of the Expiration Date" (December 31, 2012), unless SP otherwise notified Zell in writing.

If the "Closing" occurred without the "Necessary Approvals," the Assignment would be held "in trust on and after

the Closing Date," and Zell would "continue to be required to perform the additional covenants specified in Section 6 of these Terms"—that is:

(1) "to refrain, except with the express written consent of Buyer and for Buyer's benefit, from . . . disclosing the existence, pricing, and/or provisions of this Agreement and to refrain from taking, or suffering or permitting any action, which otherwise conflicts with or might impair Seller's ability to perform Seller's obligations or impair Buyer's ability to exercise Buyer's rights hereunder;"

(2) "to receive in trust for Buyer and forthwith to turn over to Buyer at Buyer's place of business in Los Angeles, California all Economic Benefits received by Seller on or after the Effective Date;"

(3) "to consult with Buyer with respect to all opportunities to vote, elect, or act with regard to the Partnership or the Partnership Interest and then to vote, elect, or act as, and only as, Buyer requests. Seller further agrees to consult with Buyer whenever Seller learns of any potential action that will or might adversely affect the physical condition of the assets and/or financial condition . . . and then to take such action as, and only as, Buyer requests at Buyer's sole cost and expense;" and

(4) "to promptly deliver and communicate to Buyer at Buyer's place of business in Los Angeles, California any information, documents, correspondence, conversations, etc. relating to the Partnership and/or Partnership Interest that Seller has access to and/or that Seller receives on or after the Effective Date."

The Agreement provided that it "shall be governed by and construed under the laws of the State of California," and that the

parties "consent to the jurisdiction of [the] Los Angeles Superior Court of the State of California to decide all disputes arising out of the Agreement."

In short, although the Purchase Agreement purported to transfer to SP "*all of* Seller's Rights and Claims" to Newport Highlands, the attached "Terms and Conditions" provided otherwise—namely, that if Newport Highlands did not approve the transfer to SP, Zell would remain the nominal owner of the partnership shares, but would be obligated to turn over all future distributions to SP, to provide SP with any information, documents, or correspondence he received from Newport Highlands, and to vote his Newport Highlands shares "only as [SP] directs."

D. The "Closing" Without "Necessary Approvals"

On December 28, 2012, approximately a year and a half after Zell signed the purchase agreement, SP advised him that it had not been able to obtain "Necessary Approvals" from Newport Highlands "as contemplated in the purchase agreement." However, "this does not frustrate our transaction" because SP had elected to "waive[] the Conditions Precedent" and "continue to hold the Assignment in trust." As a result, Zell would remain "the owner of record of the Partnership Interest," but SP would be entitled to "all income, loss, distributions, proceeds, etc. received by you with respect to the Partnership Interest."

Going forward, SP directed Zell to do the following:

"Upon your receipt of anything related to Newport Highlands Associates (including any notices, distributions, K-1's, ballots, correspondence, etc.) you should immediately forward it to SP. If you receive a distribution, you should immediately send

SP (i) a copy of the check and any correspondence you receive along with it, and (ii) a check payable to SP Investment Fund III LLC in the amount of the distribution. If you receive a K-1, whether it is issued in your name or not, you should immediately forward it to SP so that SP can report its share of all income or loss which accrues on or after the Closing Date. If you receive a ballot, you should vote as SP directs."

"From time to time, SP may direct you to forward certain communications to the general partner (including appropriate responses to things you have received from the general partner) and you should comply with those directions. . . . [¶]

"If you have received any distributions or correspondence after the Effective Date (May 6, 2011) which you have not yet forwarded to SP, . . . please forward such distributions now via a personal check made payable to SP Investment Fund III LLC."

On June 29, 2013, and again on June 13, 2014, SP wrote to Zell, directing him to forward his K-1 and any distributions and/or ballots received from Newport Highlands.

E. Zell's Cancellation of the Sale

In February 2015, Zell advised SP that he had become aware that Newport Highlands would not consent to the transfer of his shares to SP, and he thus was returning the purchase price with interest and canceling the sale. In pertinent part, Zell's letter stated as follows:

"On May 6, 2011, you forwarded to me a Purchase and Sale Agreement for the transfer of my 1.83% Limited Partner interest in Newport Highlands Associates, L.P., together with a check in the sum of $3,600.00.

"In your transmittal letter, you did not advise me that this sale could not occur without the explicit consent of the Operating

General Partner of Newport Highlands Associates, L.P. The Operating General Partner of Newport Highlands Associates, L.P. is LDC-NH Corp. We call your attention to Article 19 of the Partnership Agreement which states that the admission of a substitute Limited Partner is 'subject to the consent of the Operating General Partner.'

"No consent was ever given by the Operating General Partner to this transaction.

"We further call your attention to the enclosed letter sent to you by fax on April 12, 2011 from Anne Dyring Riley, Esq., the attorney for the Operating General Partner of Newport Highlands Associates, L.P. This letter makes clear that the Operating General Partner will not consent to any transfers of the Limited Partnership interests. This letter was sent to you prior to your attempt to purchase my interest and you knew that any purchase of my interest would be null and void.

"Therefore, it is apparent that the alleged Purchase and Sale of my interest would be a nullity.

"Nevertheless, and without prejudice to my rights, and in the spirit of settlement, I am enclosing the sum of $4,000.00 to resolve this matter. This sum represents the full return of the monies given to me, together with significant interest. This payment to you will terminate the above alleged sale.

"Therefore, I will not be sending any further documents, K-1's or dividends to you, since I remain the owner of this interest and have terminated this transaction."

F. Present Action; Zell's Motion for Summary Judgment

SP refused to cancel the purchase agreement or to accept return of the purchase price. Instead, it filed the present action against Zell and his wife (collectively, Zell) on April 9, 2015. It

asserted causes of action for breach of contract and conversion, and alleged that Zell had breached the purchase agreement by repudiating it and refusing to promptly deliver documents and turn over distributions to SP. The complaint sought specific performance of the agreement, compensatory damages in excess of $290,000, punitive damages, attorney fees, costs of suit, and prejudgment interest.[1]

Zell moved for summary judgment. He asserted that Newport Highlands's limited partnership agreement prohibited the assignment of a limited partnership interest without the consent of the operating general partner, and the operating general partner had not, and would not, consent to the transfer. Further, the California Uniform Limited Partnership Act (California ULPA) provides that a transfer of a limited partnership interest in violation of a restriction on transfer in the partnership agreement is ineffective as to a person with notice of the restriction. Accordingly, as a matter of law Zell lacked the power to assign his partnership interest to SP.

SP opposed the motion. It asserted that multiple triable issues of material fact precluded summary judgment, and the California ULPA did not apply to the transaction because Newport Highlands is a New York partnership.

The trial court granted summary judgment. It concluded that all relevant facts were undisputed (although the parties disputed the " 'characterization' of the writings at issue"), and the purchase and sale agreement was invalid as a matter of law

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[1] Zell filed a cross-complaint on May 26, 2015. He dismissed his cross-claims on July 5, 2016, and thus they are not a part of this appeal.

because SP had notice prior to the execution of the agreement that the Operating General Partner would not consent to the transfer.

On May 20, 2016, Zell died at the age of 90. His son, William A. Zell, as executor of his estate, was substituted in as a defendant on June 23. Thereafter, judgment was entered on November 9, 2016, and SP timely appealed.[2]

DISCUSSION

The issue presented by this appeal is whether Newport Highlands's refusal to allow Zell to transfer his limited partnership interest rendered the purchase agreement between SP and Zell unenforceable as a matter of law. SP contends that the purchase agreement was not inconsistent with either the Newport Highlands partnership agreement or applicable law, and thus the purchase agreement must be enforced. Zell disagrees, urging that the purchase agreement is contrary to the partnership agreements' restrictions on transfers of partnership interests without consent, and that those transfer restrictions are enforceable under state law.

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[2] The trial court initially entered judgment on September 19, 2016, from which SP filed a notice of appeal. Subsequently, the trial court struck the September 19 judgment on its own motion because the complaint had erroneously identified Zell's wife as "Joss Zell," rather than Joan Zell, and thus the judgment did not match the complaint. On November 9, the court entered an amended judgment that explained that Zell's wife is Joan Zell; SP subsequently filed a notice of appeal from the corrected judgment. This court consolidated the two appeals on February 28, 2018.

As we now discuss, New York's partnership law permits partnerships to restrict transfers of partnership rights in order to protect the right of partners to choose with whom they wish to associate. Enforcing the purchase agreement in present circumstances—that is, where Newport Highlands has explicitly *refused* to accept SP as a substitute limited partner—would fundamentally thwart the partnership's ability to choose with whom it does business. The purchase agreement therefore is unenforceable as a matter of law, and the trial court properly granted summary judgment for Zell.

I.
Standard of Review

" 'The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A motion for summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists only if 'the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850, fn. omitted.)" (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 399–400.)

" 'A defendant moving for summary judgment or summary adjudication may demonstrate that the plaintiff's cause of action has no merit by showing that (1) one or more elements of the

cause of action cannot be established, or (2) there is a complete defense to that cause of action.' [¶] . . . [¶] 'After the defendant meets its threshold burden [to demonstrate that a cause of action has no merit], the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action or affirmative defense.' " (*Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 296.) On appeal from summary judgment, we review the record de novo and independently determine whether triable issues of material fact exist. (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 169.)

II.

The Purchase Agreement Is Unenforceable

A. Under California Law, Contracts Contrary to "the Policy of Express Law" Are Unenforceable

The purchase agreement recites that it was entered into in Los Angeles, California, and will be "governed by and construed under the laws of the State of California." Both parties agree that, pursuant to this provision, California law governs the purchase agreement. Thus, because the purchase agreement selected the law of the forum, and because neither party suggests we should do otherwise, we will apply California law to issues of the meaning and enforceability of the purchase agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 275 [because "[t]he parties and the trial court assumed that California law applies . . . we may apply California law . . . ."].)

"Under general principles of California contract law, a contract is unlawful, and therefore unenforceable, if it is '[c]ontrary to an express provision of law' or '[c]ontrary to the policy of express law, though not expressly prohibited.' (Civ.

Code, § 1667.)" (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 73 (*Sheppard Mullin*); see also Civ. Code, §§ 1441 ["A condition in a contract, the fulfillment of which is . . . unlawful . . . is void"], 1550 [contract must have "lawful object"], 1608 ["If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void"].)

" '[T]he law has a long history of recognizing the general rule that certain contracts, though properly entered into in all other respects, will not be enforced, or at least will not be enforced fully, if found to be contrary to public policy.' (15 Corbin on Contracts (2003) § 79.1, p. 1 (Corbin); see also *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135 [' " 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out . . .' " ']; *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150 ['the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act']; Winfield*, Public Policy in the English Common Law* (1928) 42 Harv. L. Rev. 76.) Such agreements are 'traditionally referred to as "illegal contracts," ' even though they 'are functionally described as contracts unenforceable on grounds of public policy.' (Rest.3d Restitution & Unjust Enrichment (Tent. Draft No. 3, Mar. 22, 2004) § 32, com. a, p. 154 (Tentative Draft).)" (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 540–541 (*Kashani*).)

"A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity [citation], and the parties will be left . . . where they are found when they come to a court

for relief." (*Tiedje v. Aluminum Taper Milling Co*. (1956) 46 Cal.2d 450, 453–454.) Applying this principle, courts have refused to enforce contracts determined to be contrary to public policy. (E.g., *Sheppard Mullin*, *supra*, 6 Cal.5th 59 [holding unenforceable a retainer agreement that violated the Rules of Professional Conduct]; *Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1148 [attorney retainer agreement held unenforceable "[t]o the extent [it] purports to 'draft around' [the provisions of the Labor Code] by depriving the [Workers' Compensation Appeals Board] of its statutory authority to fix attorney fees"]; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638 [arbitration agreement unenforceable because it contained a cost-sharing provision requiring employee to pay half of costs of arbitration].)

With these principles in mind, we now turn to an examination of the statutory provisions that govern transfers of partnership interests.

B. Statutory Limitations on Transfers of Limited Partnership Interests

1. Choice of Law

Before addressing statutory provisions governing transfers of limited partnership interests, we face a preliminary question regarding choice of law. " ' "[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state . . . ." ' [Citations.]" (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919.) If a party does so, it must demonstrate "that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to

the case before it. [Citations.]" (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.)

SP contends that the transferability of Newport Highlands limited partnership units is governed by New York substantive law, and we agree. It is undisputed that Newport Highlands is a limited partnership organized under the laws of New York. Under California Corporations Code section 15909.01, "[t]he laws of the state . . . under which a foreign limited partnership is organized govern relations among the partners of the foreign limited partnership and between the partners and the foreign limited partnership . . . ." Thus, New York law governs how and under what circumstances Zell, a limited partner, may transfer his partnership interest in Newport Highlands.

2. New York Revised Limited Partnership Act

The New York Revised Limited Partnership Act (RLPA) (N.Y. Partnership Law, art. 8-a, §§ 121–101 et seq. (McKinney 2018)) provides that "except as provided in the partnership agreement," a limited partner may assign his or her "share of the profits and losses of [the] limited partnership [and] right to receive distributions." (*Id*., §§ 121–101, subd. (m), 121–702, subds. (a)(1).) Such assignment does not "cause the partner to cease to be a partner or to have the power to exercise any rights or powers of a partner," nor does it "entitle the assignee to become or exercise any rights or powers of a partner." (*Id*., § 121–702, subd. (a)(2), (4).) Instead, "[t]he only effect of an assignment is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits to which the assignor would be entitled." (*Id*., § 121–702, subd. (a)(3).) An assignee may become a limited partner only if "(i) the assignor gives the assignee that right in accordance with authority

granted in the partnership agreement, or (ii) all partners consent in writing, or (iii) to the extent that the partnership agreement so provides." (*Id*., §§121–702, subds. (a)(2), 121–704, subd. (a).)

The RLPA thus distinguishes between the rights of limited partners to receive profits, losses, and distributions (which we will refer to as "distribution rights") and their rights to participate in the conduct of the partnership's activities, including by exercising voting rights, accessing information about partnership transactions, and inspecting partnership records (which we will refer to as "membership rights"). Under the RLPA, if the partnership agreement does not direct how distribution and membership rights may be transferred to third parties, such transfers are governed by the RLPA's default provisions. Those provisions state that a limited partner may freely transfer distribution rights, but must obtain partnership approval to transfer membership rights. However, if a partnership agreement *does* direct how distribution and membership rights may be transferred to third parties, the partnership agreement governs. (See *Ederer v. Gursky* (2007) 9 N.Y.3d 514, 526 [Partnership Law's provisions "are, for the most part, default requirements that come into play in the absence of an agreement"]; *Bailey v. Fish & Neave* (N.Y. App. Div. 2006) 30 A.D.3d 48, 52, 814 N.Y.S.2d 104, 107–108 ["It is a long-settled principle in New York law that partners are allowed to agree among themselves how their partnership will be governed, and that [provision of the partnership law] is a default provision only applicable absent such an agreement"].)

Courts have explained that the statutory proscription barring non-consensual assignments of membership in the

partnership "is based upon the principle of *delectus personarum* (or *delectus personae*), the choice of person. '[A]t the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.' [Citations.] A partnership is often an intimate business relationship likened to a marriage or a family. [Citations.] The assignment of economic rights does not violate the principle of *delectus personarum*, 'but it would be violated by the admission of a new speaking and voting member into the closely knit arrangement that typifies the general partnership.' Alan R. Bromberg & Larry E. Ribstein, Bromberg & Ribstein on Partnership § 3.05(c)(4), at 3:86 (1999) ('Bromberg & Ribstein').

"The right to choose associates in a general partnership is understandably important. . . . [¶] Nevertheless, the law governing limited partnerships has never abandoned the principle of *delectus personarum*. The restriction on the transfer of membership has been part of the limited partnership laws since the promulgation of the original Uniform Limited Partnership Act in 1916, see Unif. Limited Partnership Act § 19(3), 6A U.L.A. 397 (1995), and as noted, continues under the revised act." (*In re Schick* (Bankr. S.D.N.Y. 1999) 235 B.R. 318, 324.)

C. The Purchase Agreement Is Contrary to the Policies of the RLPA

As we have said, the parties' obligations under the purchase agreement expressly were not conditioned on the partnership's consent to the transfer of Zell's limited partnership interest to SP. Instead, the purchase agreement provided that if the partnership did not consent to the transfer, Zell would assign his interest to SP "in trust," and would, in perpetuity:

(1) refrain from "disclosing the existence, pricing, and/or provisions of this Agreement" and from taking any action that would impair SP's rights;

(2) turn over to SP "all Economic Benefits" (distributions) received by Zell from the partnership;

(3) "consult with Buyer with respect to all opportunities to vote, elect or act with regard to the Partnership or the Partnership Interest and then to vote, elect, or act as, and only as, Buyer requests;" and

(4) deliver to SP "any information, documents, correspondence, conversations, etc. relating to the Partnership and/or Partnership Interest."

SP urges that the agreement is enforceable because none of these provisions violates New York's partnership law. SP is correct in part: The RLPA does not specifically prohibit a limited partner from remaining the nominal owner of a partnership interest, but agreeing to provide a third party with confidential partnership documents and to vote on partnership matters as the third party directs.

However, as we have described, the RLPA permits partnerships, through their partnership agreements, to restrict transfers of partnership interests without consent. Newport Highlands has opted to exercise this statutory right: Its partnership agreement provides that a limited partner's transfer of distribution rights and withdrawal from the partnership, as well as a transferee's admission to the partnership, are "[s]ubject to the Consent of the Operating General Partner."

It is undisputed that the general partner, on whose consent transfer is conditioned, has refused to consent to the transfer of Zell's limited partnership interest to SP. Newport Highlands's

restrictions on transfer, and the general partner's ability to control with whom it does business, would be wholly frustrated if we were to enforce the purchase agreement in the present circumstances. That is, were we to enforce the purchase agreement according to its terms, SP, although not formally a member of the partnership, would have all the rights of a limited partner—to receive partnership profits and distributions, to review partnership documents, and to direct how Zell "vote[s], elect[s] or act[s] with regard to the Partnership or Partnership Interest." As such, the partnership's ability to restrict with whom it does business—and specifically to choose *not* to do business with SP, which it repeatedly has expressed its desire to do—would be entirely thwarted.

In short, the purchase agreement, although not in violation of "an express provision of law," plainly is contrary to "*the policy* of express law" (Civ. Code, § 1667)—namely, that a partnership need not accept a member with whom it does not wish to associate. We will not enforce a contract under these circumstances, thus allowing SP to " ' "to do indirectly that which it could not do directly." ' " (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 358 [party "was not permitted ' "to do indirectly that which it could not do directly." ' "]; see also *Sheppard, Mullin, supra*, 6 Cal.5th at p. 74 [it would be "absurd" for a court to aid a party in enforcing a transaction prohibited by statute]; *Metropolitan Water Dist. of Southern Cal. v. Riverside County* (1943) 21 Cal.2d 640, 642 ["What cannot be done directly may not be done indirectly."].) Because SP's causes of action for breach of contract and conversion both depend on an enforceable contract, our

conclusion that the contract is *not* enforceable means that both causes of action necessarily fail as a matter of law.[3]

III.

SP's Contrary Contentions Are Without Merit

A. The Present Case Is Distinguishable from SP Investment v. Cattell

SP contends that the present case is governed by the recent decision by Division Four of this court in *SP Investment Fund I LLC v. Cattell* (2017) 18 Cal.App.5th 898 (*Cattell*). *Cattell* concerned SP's purported purchase of defendant Albert Cattell's 1.24 percent limited partnership interest in Morrisania IV Associates, a New York limited partnership. The purchase agreement executed by SP and Cattell was virtually identical to the one executed in the present case, and, as in this case, SP waived the "conditions precedent" and purported to "close" the transaction without "necessary approvals" from the limited partnership. SP then sued Cattell for breach of contract and conversion, asserting that Cattell "has refused to deliver Partnership-related documents to SP, has refused to take actions and execute instruments requested by SP to obtain or render unnecessary the Necessary Approvals, and has refused to turn over to SP distributions from the Partnership, resulting in damages to SP of more than $190,000." (*Id.* at pp. 900–902.)

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[3] We note that SP's cause of action for conversion does not depend on the transfer of Zell's voting rights. However, because SP's conversion claim *does* depend on the existence of an enforceable contract, our conclusion that the contract is not enforceable is dispositive of the conversion claim, as well as the claim for breach of contract.

At a status conference, the trial court set a hearing on its own motion to consider whether it should enter judgment on the pleadings. It then granted judgment for Cattell, concluding that SP could not waive the condition that obligated it to obtain the partnership's consent to the transfer. (*Cattell*, *supra*, 18 Cal.App.5th at p. 904.)

The Court of Appeal reversed. It noted that obtaining "Necessary Approvals" was a condition precedent to *SP's* obligation to close, not to Cattell's. (*Cattell*, *supra*, 18 Cal.App.5th at p. 904.) Thus, the court said, "even if the Necessary Approvals were legally required to effectuate a transfer of the Partnership Interest," an issue "that could not be determined, in any event, on a motion for judgment on the pleadings because the pleadings did not allege the terms of the Partnership's partnership agreement," SP's failure to obtain such approvals was not fatal to SP's breach of contract claim. (*Id*. at p. 906.)

The present case is distinguishable. Because *Cattell* was an appeal of a grant of judgment on the pleadings, Division Four did not have the benefit of relevant evidence available to us in the present appeal—namely, that Newport Highlands's partnership agreement conditions transfers of limited partnership interests on the consent of the general partner, and that the general partner had, prior to the execution of the purchase agreement, expressly refused to consent to the proposed transfer of Zell's limited partnership interest to SP.

Further, because the parties did not raise the issue, the *Cattell* court did not consider whether the purchase agreement was contrary to the policy of statutory law. " 'It is axiomatic that

cases are not authority for propositions not considered.' " (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

For both of these reasons, therefore, *Cattell* does not guide our decision in this case.

B. SP's Remaining Contentions Lack Merit

SP makes a variety of additional claims regarding Zell's entitlement to summary judgment; none has merit.

First, SP challenges the trial court's reliance on the copy of the Newport Highlands's partnership agreement provided in support of Zell's motion for summary judgment, urging that the partnership agreement was "not properly authenticated" because Zell did not sign it or witness its execution. The contention is without merit. " 'Authentication is to be determined by the trial court as a preliminary fact ([Evid. Code,] § 403, subd. (a)(3)) and is statutorily defined as "the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is" or "the establishment of such facts by any other means provided by law" ([Evid. Code,] § 1400).' [Citation.] 'The means of authenticating a writing are not limited to those specified in the Evidence Code. ([Evid. Code,] § 1410 ["[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved"]; [citation].) For example, a writing can be authenticated by circumstantial evidence and by its contents.' [Citation.]" (*People v. Landry* (2016) 2 Cal.5th 52, 87.)

Here, Zell declared under penalty of perjury that the document he provided in support of his motion for summary judgment was "a true and correct copy of the Restated Limited Partnership Agreement of [Newport Highlands]." As a Newport Highlands limited partner, Zell had access to the books and

records of the partnership, including its partnership agreement. Further, the date that appears on the face of the document, July 1, 1998, is also referenced in the August 16, 2012 amendment to the partnership agreement, which was authenticated by the attorney for Newport Highlands's general partner. And, the document's contents suggest that it is what it purports to be—i.e., Newport Highlands's partnership agreement. The trial court's admission of the partnership agreement, thus, manifestly was not an abuse of discretion. (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 570 [trial court's evidentiary rulings reviewed for abuse of discretion].)

Second, SP contends the partnership agreement does not restrict a limited partner's transfer of distribution rights. Not so. As we have said, Newport Highlands's partnership agreement explicitly provides that the "transfer of the Interest of the Limited Partner"—defined as the "partner's share of the allocations of Net Profits and Losses, Credit, Net Cash from Operations and Net Cash Proceeds from a Sale or Refinancing"—is "[s]ubject to the Consent of the Operating General Partner." But even were we to agree with SP that a Newport Highlands limited partner could freely transfer his or her *distribution rights*, there is no dispute that a limited partner's transfer of *membership rights* is subject to the general partner's consent. For all the reasons we have discussed, requiring Zell to "vote, elect or act with regard to the Partnership or the Partnership Interest . . . as, and only as, Buyer requests" is fundamentally inconsistent with the partnership agreement's restrictions on transfer of membership rights without consent. SP does not cite any authority for the proposition that these provisions can be

"extirpated from the contract by means of severance or restriction." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 (*Armendariz*).)[4]

Third, SP contends that there is a triable issue of fact as to whether SP had notice of the transfer restrictions in the partnership agreement. The contention is without merit. SP's manager, Gil Seton, admits in his declaration that he saw the letter from Newport Highlands's general partner's attorney advising him of those transfer restrictions on or about April 20, 2011, several weeks *before* SP and Zell executed the purchase agreement. As such, SP unquestionably had notice both that partnership interests could be transferred only with permission of the general partner and that the general partner would not give such permission.[5]

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[4] We note that whether illegal provisions of a contract may be severed " 'depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 122, quoting *Keene v. Harling* (1964) 61 Cal.2d 318, 320–321.) Severance is appropriate only where necessary to "prevent parties from gaining undeserved benefit or suffering undeserved detriment" or "to conserve a contractual relationship if to do so would not be condoning an illegal scheme." (*Armendariz*, *supra*, at p. 124.) SP has not cited any evidence or advanced any legal argument to suggest that severance would be appropriate under these standards; therefore, we deem any such contention forfeited. (E.g., *Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066 ["When an appellant asserts a point but fails to support it with reasoned argument and citations to authority, we treat the point as forfeited."].)

[5] SP's contention that "[n]either Ms. Riley's letter nor her Declaration is competent evidence of the intention of the general

Fourth, SP urges that "[t]here is not sufficient admissible evidence in the record" to determine whether the partnership agreement is subject to the RLPA or, instead, to its predecessor, the Uniform Limited Partnership Act (prior law). The difference is material, SP urges, because while "[the RLPA] empowered partnerships, through their partnership agreements, to limit assignability . . . [prior law] did not."

We do not agree. By its terms, the RLPA applies to all limited partnerships formed after July 1, 1991, as well as to all earlier-formed limited partnerships that elect to be governed by the revised law. (N.Y. Partnership Law, §§ 121–1201, 121–1202.) It appears that Newport Highlands was formed under the former law but has elected to be governed by the RLPA's provisions: Its Restated Limited Partnership Agreement recites that the partnership was formed in 1983, but filed a certificate of adoption of the Revised Act in July 1998.[6] But even if the RLPA did not

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partner" is meritless. In both her letter to SP and in her declaration in support of Zell's motion for summary judgment, Riley identifies herself as counsel for LDC-NH, Inc., Newport Highlands's operating partner. As such, Riley "properly spoke on [the operating general partner's] behalf as [its] legal representative." (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1137 [client "was not required to take the stand and personally advise the court she wished to invoke [legal rights]. Her attorney properly spoke on her behalf as her legal representative, just as attorneys customarily speak on their clients' behalves on a variety of issues"].)

[6] With its supplemental letter brief, Zell has filed a request for judicial notice of (1) the Newport Highlands's certificate of adoption of the RLPA, and (2) the notice of filing of the certificate of adoption of the RLPA. Because these documents are

apply, the partnership agreement nonetheless would govern transfers of limited partnership interests because the former law, like the present once, permitted partnerships to alter the act's default provisions through their partnership agreements. (See, e.g., *Furman v. Cirrito* (2d Cir. 1987) 828 F.2d 898, 901 ["The rights and obligations of partners, as between themselves, are fixed by the terms of the partnership agreement"]; *Silverman v. Weil* (D.D.C. 1987) 662 F.Supp. 1195, 1197 ["Under New York law . . . the rights of the limited partnership are governed by the partnership agreement"]; *Riviera Congress Associates v. Yassky* (N.Y. App. Div. 1966) 25 A.D.2d 291, 295 ["As between themselves, if there is no legal prohibition to the contrary, partners may make such agreements as they wish with regard to partnership affairs and 'If complete, as between the partners, the agreement so made controls' "].)

Finally, SP contends that Zell cannot assert the transfer restrictions in the partnership agreement as a basis for vitiating the purchase agreement because the right to "enforce" the partnership agreement is "reserved to the Partnership or its general partner." This contention, too, is without merit. In this litigation, Zell is not "enforcing" the partnership agreement—the general partner has done that by refusing to consent to the transfer of Zell's share to SP. Zell has, instead, merely contended that because the general partner has refused to consent to the transfer, the purchase agreement is unenforceable. As a party to the purchase agreement, Zell unquestionably has standing to assert its unenforceability. (E.g., *Kanno v. Marwit Capital*

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unnecessary to our decision, we deny the request for judicial notice.

Partners II, L.P. (2017) 18 Cal.App.5th 987, 1019 [party to stock redemption agreement had standing to sue for its breach: " '[I]t goes without saying that a party to a contract or one for whom the contract was intended to benefit may bring actions related to such contracts.' "].)

DISPOSITION

The judgment is affirmed. Respondents' request for judicial notice, received September 28, 2018, is denied. Respondents are awarded their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.